

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARTHA M.,

Plaintiff,

V.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C19-6124-BAT

**ORDER AFFIRMING THE
COMMISSIONER AND DISMISSING
THE CASE WITH PREJUDICE**

Plaintiff appeals the denial of her application for Disability Insurance Benefits. She contends the decision should be reversed because (1) the ALJ failed at step two of the sequential analysis to list post-laminectomy syndrome as a severe condition, thereby failing to consider the consequent pain; (2) the ALJ failed to account for the limiting effects of pain in assessing RFC; (3) the ALJ discounted the lay testimony of her husband; and (4) the Appeals Council improperly acted as a fact finder rather than as an appellate body. Dkt. 8. The Court **AFFIRMS** the Commissioner's final decision and **DISMISSES** the case with prejudice.

BACKGROUND

Plaintiff was in her late-50s when she applied for benefits. Tr. 125. Her alleged onset date is April 1, 2010, and she last met the insured status requirements on September 30, 2014. Tr. 324. Her case has seen a number of decisions: the first ALJ decision in 2012, Tr. 11–17; this

1 Court's order reversing and remanding in 2015, Tr. 443–49; the second ALJ decision in 2016,
2 Tr. 459–64; the first Appeals Council remand to resolve outstanding issues in 2017, Tr. 472–74;
3 the third ALJ decision in 2018, Tr. 321–33; and the second Appeals Council order in 2019
4 partially adopting the ALJ's 2018 decision, partially rejecting the 2018 decision, and concluding
5 that plaintiff was not disabled because she could perform past relevant work as a "gambling
6 dealer" (DOT 343.464-010), Tr. 310–16. The Commissioner has determined that plaintiff has the
7 severe impairments of degenerative disc disease status-post discectomy L5-S1, right lower
8 extremity radiculitis, and obesity. *See* Tr. 325. The Commissioner has also determined that
9 during the relevant period of April 1, 2010 to September 30, 2014, plaintiff had the residual
10 functional capacity ("RFC") to perform light work with additional limitations. *See* Tr. 326.

11 DISCUSSION

12 Plaintiff contends that the Commissioner's final decision was harmfully erroneous
13 because (1) the ALJ declined to list post-laminectomy syndrome as a severe condition at step
14 two, thereby failing to consider the consequent pain; (2) the ALJ did not account for the limiting
15 effects of pain in assessing RFC; (3) the ALJ discounted 2016 lay testimony by plaintiff's
16 husband; and (4) the Appeals Council exceeded its authority as an appellate body by engaging in
17 fact finding. Dkt. 8. The Court disagrees with plaintiff's contentions and finds the
18 Commissioner's final decision to be supported by substantial evidence and to be free from
19 harmful legal error. *See Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012).

20 1. Considering Post Laminectomy Syndrome at Step Two and Consequent Pain

21 Plaintiff contends that the ALJ erred by declining to find that post-laminectomy
22 syndrome, also known as "failed back syndrome," was a severe impairment at step two, and thus
23 failed to consider the pain caused by that condition. Dkt. 8, at 6–7. That contention is not

1 supported by the record and, regardless, constitutes harmless error because the ALJ found the
2 sources of that post-laminectomy syndrome— degenerative disc disease status-post discectomy
3 L5-S1, right lower extremity radiculitis—to be severe impairments and adequately considered
4 the severity of the back and other pain plaintiff was experiencing.

5 The ALJ considered plaintiff's numerous back impairments, noting her degenerative disk
6 disease, status post discectomy L5-S1, and radiculitis of the right lower extremity. Tr. 325–26,
7 328. The ALJ noted that prior to the April 2010 amended alleged onset date, plaintiff had a
8 history of low-back pain status post-surgery, most recently right L5-S1 discectomy in July 2000,
9 and postoperatively developed right lower extremity radicular symptoms. Tr. 328. The ALJ
10 noted failed attempts to place trial spinal cord stimulators in 2003 and 2006. *Id.* And the ALJ
11 referred specifically to the pain clinic's assessment of **post-laminectomy lumbar syndrome**
12 with chronic right L5-S1 radiculopathy and extensive notes about plaintiff's chronic pain
13 medication regimen. Tr. 328 (citing Tr. 225–71, 796–839). Thus, contrary to plaintiff's
14 contention, the ALJ considered the pain occasioned by plaintiff's post-laminectomy syndrome
15 and discounted the severity of plaintiff's allegations of pain by citing numerous medical notes
16 from the pain clinic. Tr. 327–31; *see, e.g.*, Tr. 268 (January 2012 pain clinic notes stating that she
17 was fired from job as a table games dealer for tardiness); Tr. 762 (February 2014 pain clinic
18 notes stating that plaintiff was unsure about trying pain pump trial because she had 80–90%
19 improvement of pain from medications and because she was planning an extended bike ride
20 during the summer); Tr. 777 (August 2013 pain clinic notes stating that plaintiff “is able to
21 continue to be very active with exercise and working”); Tr. 780 (June 2013 pain clinic notes
22 stating that plaintiff could sit on a recumbent bicycle and travel great distances without pain); *see*
23 *also* Tr. 31 (plaintiff's 2012 hearing testimony stating that during her seasonal work at the fair

1 she worked 8 to 10 hours per day and even worked 12 hours on a day because “I said I’d do
 2 anything I could for them”).

3 It is harmless error for an ALJ to omit an impairment at step two if the subsequent
 4 assessment of RFC included the relevant limitations. *See Buck v. Berryhill*, 869 F.3d 1040,
 5 1048–49 (9th Cir. 2017). Step two is a threshold inquiry meant to screen out weak claims; “[i]t is
 6 not meant to identify the impairments that should be taken into account when determining the
 7 RFC.” *Id.* The ALJ considers all the limitations and restrictions imposed by an individual’s
 8 impairments, even those that are not severe. *Id.* at 1049. The RFC is thus the same regardless of
 9 whether certain impairments are considered “severe” or not. *Id.* Here, the ALJ accounted for all
 10 of plaintiff’s impairments related to her back and other pain. Moreover, step two was decided in
 11 plaintiff’s favor such that she could not possibly have been prejudiced. Any alleged error is
 12 therefore harmless and cannot be the basis for a remand. *Id.*

13 Plaintiff has failed to demonstrate that the ALJ committed harmful error by not listing
 14 post-laminectomy syndrome as a severe impairment at step two.

15 **2. Accounting for Pain in RFC Assessment**

16 Plaintiff argues that “[n]o[]where in the decision does the ALJ mention the limiting
 17 effects of pain despite years of medical records where significant pain is reported and treated
 18 with narcotic pain medications.” Dkt. 8, at 7–8. Plaintiff’s characterization of the ALJ’s
 19 evaluation of the record is inaccurate and incorrect.

20 As discussed above, the ALJ discounted the severity of plaintiff’s complaints of pain by
 21 reviewing years of pain clinic records and plaintiff’s own statements. The ALJ cited clear and
 22 convincing reasons for discounting plaintiff’s pain testimony: (a) it was unsupported by the
 23 objective evidence, including reports to the pain clinic that her pain management was stable and

1 she was able to travel long-distance on a recumbent bicycle; (b) it was inconsistent with her
2 activities of daily living, including caring for her husband after a knee replacement, which
3 involved lifting his wheelchair, and her elderly mother; (c) it was undermined by her non-
4 disability reasons for leaving her past work as a table games dealer; and (d) she did not receive
5 the extent of treatment one would expect for a totally disabled person, including that through the
6 date last insured there were no significant, ongoing changes regarding her back and leg pain. Tr.
7 237–31. Moreover, the ALJ accounted for plaintiff’s supported complaints of pain in the RFC
8 by, for example, limiting her to occasionally climbing ramps and stairs; never climbing ladders,
9 ropes, or scaffolds; occasionally stooping, kneeling, crouching, or crawling; and never operating
10 heavy foot controls with her right lower extremity. Tr. 326.

11 Plaintiff has failed to demonstrate that the ALJ did not account for the limitations of pain
12 in assessing RFC. The ALJ’s RFC assessment is supported by substantial evidence and free from
13 harmful legal error.

14 **3. 2016 Lay Testimony by Plaintiff’s Husband**

15 Plaintiff contends that the ALJ failed to provide germane reasons for discounting the lay
16 testimony by plaintiff’s husband. Dkt. 8, at 13–14. The Court disagrees.

17 The ALJ discounted the lay testimony of plaintiff’s husband because (a) his statement
18 was dated February 2016 and he made no specific mention of plaintiff’s functioning prior to the
19 date-last-insured of September 30, 2014; (b) his observations were similar to plaintiff’s
20 statements and therefore were discounted for the same reasons, i.e., they conflicted with the
21 longitudinal treatment history, the objective findings, performance on physical examinations, and
22 daily activities; and (c) his statement was not entirely consistent with the clinical observations of
23 medical professionals, plaintiff’s activities, and contemporaneous reports to providers. Tr. 332;

1 *see* Tr. 661 (husband's statement). All three rationales were germane to discounting the lay
 2 testimony by plaintiff's husband. Plaintiff offers only an alternative reading of the lay testimony
 3 and of the evidence that does not undermine the reasonableness of the ALJ's evaluation.

4 **4. Appeals Council's Authority**

5 Plaintiff contends that the Appeals Council exceeded its appellate authority by
 6 determining that plaintiff could perform past relevant work as a "gambling dealer" (DOT
 7 343.464-010) when the ALJ had referred to the vocational expert's erroneous citation to a
 8 "gambler dealer" alongside an incorrect DOT number. Dkt. 8, at 14–16. The Court disagrees.

9 "If the Appeals Council assumes jurisdiction, it will make a new, independent decision
 10 based on the preponderance of the evidence in the entire record affirming, modifying, or
 11 reversing the decision of the administrative law judge, or it will remand the case to an
 12 administrative law judge for further proceedings, including a new decision. The new decision of
 13 the Appeals Council is the final decision of the Commissioner after remand." 20 C.F.R.
 14 § 404.984(b)(3). The Appeals Council therefore did not exceed its authority when it issued a
 15 new, independent decision, based on the preponderance of the evidence, and modified the ALJ's
 16 decision to reach the conclusion that plaintiff had past relevant work as a "gambling dealer"
 17 (DOT 343.464-010).

18 There is ample record evidence that demonstrates that the Appeals Council was correct to
 19 classify plaintiff's past relevant work as a table games dealer at a casino as a "gambling dealer"
 20 (DOT 343.464-010). The Appeals Council noted that although the VE at the 2017 hearing
 21 referred to the non-existent position of "gambler dealer," the correct occupation of "gambling
 22 dealer" shared with "gambler dealer" the requirements of light exertional abilities and an SVP of
 23 5. Tr. 313. The Appeals Council also noted that the job duties and requirements of "gambling

1 dealer" are consistent with plaintiff's testimony and statements in her work history report form
2 about working as a table games dealer. Tr. 313 (citing Tr. 166). Further, the Appeals Council
3 noted that the VE testified that plaintiff met the SVP 5 requirements of "gambler dealer" by
4 having performed the semi-skilled work long enough to learn it, and that plaintiff's earnings
5 record demonstrated that she performed this position at substantial gainful activity levels. Tr.
6 313–14. Moreover, the Court notes that this Court's 2015 decision, Tr. 446, and the ALJ's 2016
7 decision, Tr. 463–64, refer correctly to "gambling dealer" (DOT 343.464-010), and that the VE's
8 testimony in the 2016 hearing refers correctly to "gambling dealer" (DOT 343.464-010), Tr. 369.

9 The Appeals Council did not exceed its appellate authority by determining that plaintiff
10 could perform past relevant work as a "gambling dealer" (DOT 343.464-010) and supported its
11 conclusion with substantial evidence and sound legal reasoning.

12 **CONCLUSION**

13 For the foregoing reasons, the Commissioner's decision is **AFFIRMED** and this case is
14 **DISMISSED** with prejudice.

15 DATED this 19th day of May, 2020.

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18 BRIAN A. TSUCHIDA
19 Chief United States Magistrate Judge
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